Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

September 2005

Absent stipulation, commissioners may only perform "subordinate judicial duties." *Foosadas v. Sup.Ct. (People)* (Cal. App. Third Dist.; June 22, 2005) 130 Cal.App.4th 649, [30 Cal.Rptr.3d 358, 2005 DJDAR 7529] summarizes the rules regarding the judicial powers of commissioners. Although a criminal case, these rules are equally applicable to civil cases. The opinion notes that, absent a stipulation, commissioners are statutorily authorized to perform the following functions: "hear and decide small claims cases (*Gov. Code* § 72190); conduct arraignments (*Gov. Code* § 72190.1); issue bench warrants upon a defendant's failure to appear or obey a court order (*Gov. Code* § 72190.2); sit as juvenile court hearing officers (*Welf. & Inst. Code* §§ 247-253); decide ex-parte motions for orders and writs (*Code Civ. Proc.* § 259, subd. (a)); approve bonds and undertakings (*Code Civ. Proc.* § 259, subd. (c)); decide preliminary matters in prescribed domestic relations matters, including custody of children, support, costs and attorney fees (*Code Civ. Proc.* § 259, subd. (f)); and hear actions to establish paternity and enforce child and spousal support orders (*Code Civ. Proc.* § 259, subd. (g)). These duties require no stipulation."

Foosadas holds that a failure to object to a commissioner performing one of these statutorily authorized functions is not an implied stipulation that the commissioner may also hear other matters. But the opinion also notes that the failure of a party to object before participating in other matters, such as trials, will constitute an implied stipulation. (e.g. you can't play "heads I win, tails you lose" by first finding out how the commissioner will rule before making your objection.)

Class action waivers in consumer contracts of adhesion may be unenforceable. Appellate courts have differed on the issue of whether a waiver of the right to bring a class action in a consumer contract is unconscionable and thus, unenforceable. Such clauses are often part of an arbitration clause. The California Supreme Court has now held that such provisions may be unconscionable and unenforceable and that such a state-law rule is not preempted by the *Federal Arbitration Act* (9 U.S.C. § 2). The case recognized that a class action under a contract containing such a clause may be subject to arbitration. *Discover Bank v. Sup.Ct. (Boehr)* (Cal.Supr.Ct.; June 27, 2005) 36 Cal.4th 148, [30 Cal.Rptr.3d 76, 2005 DJDAR 7782].

Doctrine of exhaustion of remedies may not apply if administrative remedies are unfair. As a general rule, a person may not sue before exhausting internal remedies. (*See, Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2004) §§ 1:906 ff.) But the Court of Appeal has held that no such exhaustion of remedies is required where the administrative remedies are inadequate or unfair. In *Payne v. Anaheim Memorial Medical Centre, Inc.* (Cal. App. Fourth Dist., Div. 3; May 31, 2005) (ord. pub. June 27, 2005) 130 Cal.App.4th 729, [30 Cal.Rptr.3d 230, 2005 DJDAR 7845] a divided court held that administrative remedies that did not afford plaintiff a hearing were sufficiently inadequate so that plaintiff was entitled to file suit without exhaustion of the administrative remedy.

Decision of bankruptcy court may have collateral estoppel effect in California court. In *Roos v. Red* (Cal. App. Second Dist., Div. 7; June 28, 2005) 130 Cal.App.4th 870, [30 Cal.Rptr.3d 446, 2005 DJDAR 7899] the Court of Appeal held that a judgment of the bankruptcy court determining that plaintiff's wrongful death claims were not discharged because defendant's conduct constituted willful and malicious conduct, that collaterally estopped defendant from contesting liability in the civil action.

Litigation Section Events

2006 Annual Trial Symposium & Litigation Section Retreat

April 21–23, 2006
Silverado Country Club and Resort
Napa Valley, CA

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Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with. Go to:
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The court concluded that the trial court was correct in concluding that neither the federal bankruptcy statute (28 U.S.C. § 1411) nor public policy compelled a contrary result.

Malpractice policy's requirement that claim be made and reported within the policy period may be equitably tolled under narrow circumstances. Many legal malpractice policies only provide coverage if the claim is both made and reported during the policy period. But, what if the claim comes so late in the policy period that it becomes impracticable to report it within that time frame. Under limited circumstances and provided the insured reports the claim promptly, the condition requiring the report before the policy expires may be excused under equitable principles. The court stressed that this was a very narrow exception applicable to the peculiar facts of the case. *Root v. American Equity Specialty Insurance Company* (Cal. App. Fourth Dist., Div. 3; June 28, 2005) 130 Cal.App.4th 926, [30 Cal.Rptr.3d 631, 2005 DJDAR 7914].

Court may not "correct" arbitrator's award for legal or factual errors. Code Civ. Proc. § 1286 empowers the trial court to correct an arbitration award where the arbitrator exceeded his or her powers. But, as long as an issue is within the scope of the arbitration, arbitrators do not "exceed their powers" so as to entitle the losing party to have the court "correct" the award. Therefore, where the arbitrator awarded attorney fees in erroneous reliance on a statute, the trial court could not "correct" the award on the basis that the arbitrator exceeded his powers in making the award. *Taylor v. Van-Catlin Construction* (Cal. App. Sixth Dist., June 29, 2005) 130 Cal.App.4th 1061, [30 Cal.Rptr.3d 690, 2005 DJDAR 7983].

No relief from untimely request for trial de novo after fee arbitration. After a lawyer sued a client for fees, the client demanded the dispute be arbitrated under the provisions of the mandatory fee arbitration act (*Bus. & Prof. Code*, § 6200 *et seq.*). The client lost in the arbitration. Under the act, a losing client is entitled to a trial *de novo* by requesting such a trial within 30 days after issuance of the arbitration award. Because of miscommunication between the client's lawyer and the latter's secretary, the request for trial de novo was filed a week late. The California Supreme Court held that *Code Civ. Proc.*, § 473 (b), which provides relief from defaults entered because of "mistake, inadvertence, surprise, or excusable neglect," did not apply and affirmed the trial court's denial of the relief sought. *Maynard v. Brandon* (Cal.Supr.Ct.; July 11, 2005) 36 Cal.4th 364, [30 Cal.Rptr.3d 558, 2005 DJDAR 8338].

Traps for the unwary: motion for reconsideration may not extend time for appeal. Appeals from post-judgment orders must be filed within the time limits for all appeals. This time starts to run when the minute order reflecting the ruling is entered, unless this minute order reflects that the court ordered preparation of a formal order. In the latter situation, time starts to run from the entry of the formal order. (*Cal. Rules of Court*, Rule 2.) Although the filing of a motion for reconsideration may extend these time limits, this is only true if that motion is heard and decided before the time has run to appeal from the original order. Once the time for appeal has run on the original order, it cannot be revived by the subsequent ruling on the motion for reconsideration. *Annette F. v. Sharon S.* (Cal. App. Fourth Dist, Div. 1; July 12, 2005) 130 Cal.App.4th 1448, [30 Cal.Rptr.3d 914, 2005 DJDAR 8380]. Cases are split whether the ruling on the motion for reconsideration is itself appealable. *See, In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 80-81, [84 Cal.Rptr.2d 739].

Even if licensed during part of the project, unlicensed contractor is not entitled to be paid. The Contractor's State License Law (*Bus. & Prof. Code* § 7000 ff.) prohibits contractors from maintaining any action to recover compensation for

Evaluation of New Civil Jury Instructions:

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"the performance of any act or contract" unless they were duly licensed "at all times during the performance of any act or contract." (§ 7031(a)). Appellate decisions were inconsistent as to the effect of this provision where the contractor was licensed during part of the time of performance. The California Supreme Court has now made it clear that the statute means what it says.

The court reached the following conclusions: "(1) Where applicable, section 7031(a) bars a person from suing to recover compensation for *any* work he or she did under an agreement for services requiring a contractor's license unless proper licensure was in place *at all times* during such contractual performance. (2) Section 7031(a) does not allow a contractor who was unlicensed at any time during contractual performance nonetheless to recover compensation for individual *acts* performed while he or she was duly licensed. (3) The statutory exception for substantial compliance is not available to a contractor who had not been duly licensed at some time *before beginning* performance under the contract. (4) However, if fully licensed at all times during contractual *performance*, a contractor is not barred from recovering compensation for the work solely because he or she was unlicensed when the contract was executed." *MW Erectors, Inc. v. Niederhauser Ornamental etc., Inc.* (Cal.Supr.Ct.; July 14, 2005) 36 Cal.4th 412, [30 Cal.Rptr.3d 755, 2005 DJDAR 8415].

Absent actual knowledge of threat, psychiatrists owe no duty of care to patients' victims. Where psychiatrists lacked knowledge that their patient posed a threat of harm to others, they could not be liable to the patient's victims and summary judgment in their favor was affirmed. *Calderon v. Glick* (Cal. App. Second Dist., Div. 6; July 21, 2005) 131 Cal.App.4th 224, [2005 DJDAR 8816] (the case also reiterates the rule that, unless a ruling on objections are obtained in the trial court, objections are not considered on appeal).

Businesses may not discriminate against registered domestic partners. Holding that marital status claims are cognizable under the *Unruh Civil Rights Act* (*Civ. Code* § 51), the California Supreme Court determined that a country club must extend the same privileges to registered domestic partners (*Fam. Code* § 297 ff.) as it extends to married couples. *Koebke v. Bernardo Heights Country Club* (Cal.Supr.Ct.; August 1, 2005) [2005 DJDAR 9214]. The extension of the *Unruh Act* to registered domestic partners presumably is not limited to country clubs but would apply to all businesses that give preferential treatment to married couples.

A pre-dispute waiver of the right to a jury trial is invalid. In *Grafton Partners v. Superior Court* (Cal.Supr.Ct.; August 4, 2005) 36 Cal.4th 944, [2005 DJDAR 9387] the California Supreme Court ruled that pre-dispute contractual agreements to waive jury trial are not to be enforced. Only waivers as authorized by statute (*see, Code Civ. Proc.* § 631) are consistent with Cal. Const., art. 1, § 16. The court noted that since arbitration provisions are authorized by statute they are not affected by the decision. In a concurring opinion, Justice Chin urged the legislature to amend the statute to authorize pre-dispute waivers of the right to a jury trial.

Courts are split on validity of a contractual provision requiring construction defect litigation to be conducted by a general reference. Many residential purchase agreements between developers and buyers contain a clause providing that any civil action involving a dispute under the contract must be heard by a judicial referee. (*Code Civ. Proc.* § 638 through 645.1.) Such a reference differs from an arbitration in that the referee is required to follow the law, including the rules of evidence, and must prepare findings that are reviewable on appeal in the same manner as a judgment by the trial court. The main differences between a reference and a superior court trial are that there is no jury trial and, if the parties can agree, they can designate the referee. (If they cannot agree, the court appoints the referee.)

One case held such a provision to be unenforceable. *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081, 1086, [123 Cal.Rptr.2d 288]. Two other cases previously reached a contrary result. *Greenbriar Homes Communities, Inc. v. Superior Court* (2004) 117 Cal.App.4th 337, 345, [11 Cal.Rptr.3d 371]; *Woodside Homes of Calif. Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 736, [132 Cal.Rptr.2d 35]. The Fifth Appellate District has now weighed in on the issue and held such a reference clause to be valid. *Trend Homes, Inc. v. Superior Court (Azperren)* (Cal.App. Fifth Dist.; August 2, 2005) (Case No. F046715) [2005 DJDAR 9339].

Note: Isn't such a pre-dispute agreement for a general reference, in effect, a pre-dispute waiver of the right to jury trial which the California Supreme Court held to be invalid in *Grafton Partners v. Superior Court* (see above)? In *Grafton*, the court points out that arbitration agreements are distinguishable from waivers of the right to jury trial in that they represent an agreement to avoid the judicial forum altogether. The same cannot be said for a reference agreement.